In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 847

CARLOS AND JACQUELINE MARCELLO, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The petition for certiorari in this federal income tax case presents two issues: (1) whether attorney's fees Carlos Marcello paid in resisting deportation are deductible under Section 162(a) or 212 of the 1954 Internal Revenue Code as ordinary and necessary expenses incurred in business or in the production of income; and (2) whether the petitioners are entitled under Section 1034(a) of the Code to postpone recognition of gain they realized on sale of their residence. The Tax Court held for the Commissioner on both issues (Pet. A22–A24), and the court of appeals affirmed (Pet. A2–A4, A7–A9).[1]

[1] The opinion of the court of appeals is reported at 380 F. 2d 499.

285-482—67

The decision is correct, and presents no question of general importance. There is no conflict or other reason for further review.

1. The deportation proceedings in the 1950's against Carlos Marcello arose out of his 1938 criminal conviction for transferring marihuana. Petitioners failed to prove, however, that those transfers comprised part of his business or income-producing activities. Thus, petitioners have not shown that even counsel fees incurred in defending the criminal prosecution would have been deductible on the theory that such prosecution had its "origin and character" in income-producing activities under the rule of *Commissioner* v. *Tellier*, 383 U.S. 687, 689. *A fortiori*, they have not shown that the counsel fees incurred in the subsequent deportation proceedings bore such a relationship to income-producing activities. Moreover, it is doubtful whether a deportation proceeding based upon a conviction growing out of income-producing activities has a sufficiently close relationship to those activities to justify deduction of counsel fees incurred in such proceeding. That deportation would have terminated the income producing activities of Carlos Marcello in the United States does not warrant the deduction. Compare *United States* v. *Gilmore*, 372 U.S. 39. In the circumstances, the courts below were justified in treating the fees in question as nondeductible personal expenses. See Section 262 of the Code.

2. Section 1034(a) provides for nonrecognition of gain on the sale or exchange of property used as a principal residence where the taxpayer purchases and uses a new residence within specified time limits. Pe-

tioners sold their residence and then went to live in a house that Carlos' mother had purchased in her own name. The courts below were not required, as petitioners contend, to accept as conclusive proof of Carlos' ownership an affidavit that his mother executed, but never recorded,[2] to the effect that Carlos was the real purchaser of the property. There was no corroborative evidence. With the record in this inconclusive state, the courts below were certainly warranted in holding that the petitioners failed to discharge their burden of proof.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

DAVID O. WALTER,
LORING W. POST,
Attorneys.

DECEMBER 1967.

---

[2] See 3A West's Louisiana Statutes Annotated, Revised Statutes, Section 9.2721, which deprives such an unrecorded affidavit of any binding effect as to third parties.

U.S. GOVERNMENT PRINTING OFFICE: 1967